

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TSCHIGGFRIE PROPERTIES, LTD.,)	
)	
and)	Case 25-CA-161304
)	
TEAMSTERS LOCAL 120, a/w)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS)	

TSCHIGGFRIE PROPERTIES, LTD.’s STATEMENT OF POSITION

COMES NOW Tschiggfrie Properties, Ltd. (hereafter “Tschiggfrie”), by and through its attorneys, O’Connor & Thomas, P.C., and for its Statement of Position on remand to the Board states as follows:

INTRODUCTION

This matter arises out of Tschiggfrie’s termination of its employee Darryl Galle (hereafter “Galle”) on October 1, 2015. Galle alleged that his termination was an unfair labor practice in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (“the Act”). In its February 13, 2017 Decision and Order, the Board found that Tschiggfrie’s termination of Galle violated section 8(a)(3) of the Act and that its prehearing interview of Bill Kane violated section 8(a)(1) of the Act. Tschiggfrie sought further review of the Board’s order before the 8th Circuit Court of Appeals.

In an opinion filed on July 24, 2018, the 8th Circuit granted Tschiggfrie’s petition for review and set aside the Board’s findings that: 1) Tschiggfrie’s termination of Galle violated section 8(a)(3); and 2) Tschiggfrie’s prehearing interview of Bill Kane violated section 8(a)(1). The Court remanded the case to the Board “to apply *Wright Line* consistent with this opinion to determine whether Tschiggfrie violated the Act in terminating Galle.” See Opinion at ____.

STATEMENT OF THE CASE

Tschiggfrie repairs heavy trucks and heavy equipment for its parent company, Tschiggfrie Excavating. See Hearing Transcript (“Tr.”) at 15:24-16:4. Tschiggfrie usually has five to eight employees, some of whom are mechanics. See Tr. at 17:2-9. Rod Tschiggfrie has been the general manager of Tschiggfrie for approximately 25 years. See Tr. at 16:11-14. As general manager, Rod Tschiggfrie supervises Tschiggfrie’s employees and generally runs the shop. See Tr. at 16:15-23. His office overlooks the shop, so Rod can see the employees and the equipment they are working on. See Tr. at 16:15-23. He goes down to the shop floor several times each day to discuss work issues with the employees. See Tr. at 16:15-23.

In April of 2015, Tschiggfrie employee Darryl Galle contacted Kevin Saylor, the business agent of Teamsters Local 120, about unionizing Tschiggfrie. See Tr. at 119:13-18; 170:8-13. Around the same time, Teamsters Local 120 (hereafter “the Union”) filed an election petition and an election to unionize Tschiggfrie was scheduled for May 13, 2015. See Tr. at 170:18-20, 171:17-22. The Union designated Galle as its observer for the election. See Tr. at 171:24-172:3.

Tschiggfrie learned of the attempt at organization when it received notice from the Board that a petition to organize had been filed. See Tr. at 20:1-5. Although the petition contained errors that could have required the Board to re-issue a corrected petition and set a new election date, Tschiggfrie consented to moving forward with an election without re-issuing the petition. See Tr. at 58:5-59:10. As of the spring of 2015, Tschiggfrie’s parent company, Tschiggfrie Excavating, had been a union shop for nearly fifty years and had a good relation with the different unions it did business with. See Tr. at 55:4-13; 57:14-17. Consistent with its parent company’s history, Tschiggfrie did not contest the election or unionization, form a management

team to attempt to persuade employees, or hire any campaign persuaders or consultants to talk to the employees about unionization. See Tr. at 59:11-23.

The election on the petition to organize was held on May 13, 2015 and the Union was successful. See Tr. at 172:4-6. Following the election, Tschiggfrie and the Union started negotiating. See Tr. at 172:7-11. On November 1, 2015, an agreement was presented to the Union's membership and the membership voted to accept it. See Tr. at 174:22-175:2.

Galle took an aggressive approach with his co-workers regarding the election and union matters after the election. Galle approached Sam Becker, a mechanic at Tschiggfrie since the 1990s, two to three times a week during working hours and would "carry on" about the Union. See Tr. at 302:20-304:5. Becker grew "sick and tired of the hassle" of Galle bothering him and interfering with his work and ended up quitting his job because of Galle's harassment. See Tr. at 302:20-304:20.

William Kane was another Tschiggfrie mechanic that experienced harassment from Galle about the Union. See Tr. at 327:7-9; 328:8-330:11. Kane also witnessed Galle sleeping on the job, and reported the conduct to Rod Tschiggfrie. See Tr. at 329:7-330:11. A few days after Kane told Rod Tschiggfrie that Galle was sleeping on the job, Galle told Kane he did not want to have any more contact with Kane. See Tr. at 329:7-330:11. Galle also started calling Kane a "snitch", and, on one occasion, tried to start a fight with Kane by putting up his fists and saying "Bring it on." See Tr. at 329:7-330:11.

Tschiggfrie started receiving complaints about Galle's harassment from several different employees in April and May of 2015. See Tr. at 60:15-61:7. At the time of these complaints, Tschiggfrie was aware that Galle was involved in the effort to unionize Tschiggfrie, but it did not know he was the impetus behind it. See Tr. at 61:8-17. After receiving the complaints,

Tschiggfrie did not discipline or confront Galle about the harassment. See Tr. at 64:13-19. Instead, Rod Tschiggfrie contacted Denis Reed, Tschiggfrie's union attorney, seeking advice on how to handle the situation. See Tr. at 64:23-65:7. Mr. Reed offered to contact Kevin Saylor and ask Mr. Saylor to tell Galle to "tone it down a little bit." See Tr. at 64:23-65:7. Mr. Reed called Mr. Saylor at least twice concerning Galle's harassment of coworkers. See Tr. at 276:9-14. Mr. Reed then followed up his phone calls with an email to Mr. Saylor on May 20, 2015. See Tr. at 276:15-17; General Counsel's Exhibit 4. In his May 20, 2015 email, Mr. Reed advised Mr. Saylor that Galle continued to harass employees on company time and that, if it didn't stop, Mr. Reed would "recommend steps be taken." See General Counsel's Exhibit 4.

Tschiggfrie continued to receive complaints from employees about Galle after Mr. Reed's May 20, 2015 email. See Tr. at 69:14-17, 277:21-24. Due to the continued complaints, Ed Tschiggfrie, president of Tschiggfrie, sent a written warning to Galle on August 17, 2015 "for discussing union organizational viewpoints with fellow employees during work." See General Counsel's Exhibit 5. The next day, Mr. Reed sent an email to Kevin Saylor advising that employees at Tschiggfrie were "unhappy" about Galle's "constant diatribe." See General Counsel's Exhibit 6.

While working for Tschiggfrie, Galle also had an internet sales business, Unstoppable Business, LLC, that he conducted with his wife. See Tr. at 142:8-12; 145:11-13. Unstoppable Business sold products over the internet using eBay. See Tr. at 146:5-12. Galle used websites like Thunderball Marketing (tball.com), Traffic Authority (trafficauthority.com), and QuickFunnels in connection with Unstoppable Business. See Tr. at 146:16-147:24.

Around 9:30 a.m. on October 1, 2015, Rod Tschiggfrie was walking through the shop at Tschiggfrie's place of business looking for Galle. See Tr. at 79:4-8, 79:15-17. Rod Tschiggfrie

wanted to see Galle in reference to a transmission that Galle was working on. See Tr. at 79:9-12. Rod Tschiggfrie did not find Galle, but he did find the transmission and two laptops. See Tr. at 79:18-24. Rod Tschiggfrie believed one of the laptops belonged to Galle. See Tr. at 79:25-80:5. He noticed “a page with a lot of text on it” on the screen of Galle’s laptop. See Tr. at 81:18-21. Rod Tschiggfrie took a picture of the screen of Galle’s laptop, which had five tabs for different websites that were open at the time: GoGoDropShip, Thunderball Marketing, Traffic Authority, Quick Funnels, and Allstate Gear. See Respondent’s Exhibit R-5, Tr. at 81:24-82:14. Of the five websites, only Allstate Gear was possibly related to Tschiggfrie’s business. See Tr. at 83:1-23.

After seeing the different websites on Galle’s computer, Rod Tschiggfrie continued looking for Galle. See Tr. at 84:12-15. He also asked the office manager, Ty Malcolm, to come look at the screen and be present when he confronted Galle about it. See Tr. at 84:19-24. When Galle returned to his laptop, Rod Tschiggfrie confronted him about it and recorded the conversation:

Rod Tschiggfrie: Darryl, is this your laptop over here, or is this the Company’s?

Darryl Galle: No, it’s mine.

Rod Tschiggfrie: Okay, were you on this before break?

Darryl Galle: Off and on, yeah.

Rod Tschiggfrie: Okay.

Darryl Galle: Just so you’re aware, I don’t take all of the pages down. I just put it into sleep.

Rod Tschiggfrie: I just walked into this room about ten minutes ago, Darryl, and this page was up. The computer wasn’t even sleeping, and just so you know, I

photographed this, and it appears, Darryl – and I’m recording this conversation, Darryl. It appears that you are doing something else, other than what you’re getting paid for. Is that pretty accurate?

Darryl Galle: No, it’s not.

Rod Tschiggfrie: So, what were you doing on this computer, looking at this stuff here, when I am hired to pay you to work on a transmission?

Darryl Galle: Getting the information because this transmission – because you don’t have the manual for it.

Rod Tschiggfrie: Darryl, this is the page that is up, and let me read it out loud here. It was – I scrolled just a little bit. I am sorry about this. “Part 2, the Automatic Authority Formula,” it says, “The Automatic Authority Formula is the art of using a well-designed welcome email sequence over the first five to seven days.” It sounds like some kind of a business plan or something else, other than what we would want to have at Tschiggfrie Excavating. I think your first response is pretty accurate, that you’re on your computer here prior to work – prior to break time here. Do you have anything else to say?

Darryl Galle: I was looking for information on that transmission.

Rod Tschiggfrie: There’s another laptop right here. Who owns this laptop?

Darryl Galle: That’s yours.

Rod Tschiggfrie: Okay. Well, you know what? Darryl, as of this moment, you are terminated.

See Respondent’s Exhibit R-20; Tr. at 44:9-46:3, 84:25-85:4.

The reasons Rod Tschiggfrie decided to terminate Galle on the morning of October 1, 2015 were Galle's prior warning for sleeping on the job and his use of company time to pursue his own internet sales business, evidenced by the webpage that Rod Tschiggfrie observed on Galle's computer. See Tr. at 35:20-37:23. Rod Tschiggfrie knew that the webpage he saw on Galle's computer was related to Galle's business and considered Galle's conduct as a theft of company time. See Tr. at 357:6-17. Theft of company time is not tolerated at Tschiggfrie. See Tr. at 357:6-17.

On the same morning Galle was terminated, Tschiggfrie retained a forensic technology specialist, Victor Mowery, to examine the Tschiggfrie firewall. See Tr. at 190:16-23. Mowery arrived on-site at Tschiggfrie during the mid-morning of October 1, 2015 and was asked to determine whether Galle's computer had been accessing the QuickFunnels website. See Tr. at 190:16-23; 191:12-16. Without having access to Galle's computer, Mowery reviewed Tschiggfrie's firewall log to identify Galle's computer and determine what websites it had been accessing. See Tr. at 192:15-193:5. Mowery was able to confirm through the firewall log that Galle's laptop accessed QuickFunnels.com at 9:06 a.m. on October 1, 2015. See Respondent's Exhibit R-2, p. 175; Tr. at 196:16-197:8, 197:14-198:12. Mowery also confirmed that the QuickFunnels site "was not left open from a prior session off-site." See Tr. at 200:6-18.

Through further review of the firewall log, Mowery found that, beginning at approximately 6:10 AM, on October 1, 2015, Galle's laptop was used to access internet-based business activity throughout the morning. See Respondent's Exhibit R-2, pp. 1, 125-133, 175; Tr. at 210:20-211:23. In addition to accessing websites related to his home business, Mowery also found that Galle had been accessing pornographic dating sites like Fling.Com during work hours, and had opened nine emails through the private email feature of the adult dating site

WildBuddies.com. See Respondent's Exhibits R-6, R-8, R-9, and R-10; Tr. at 212:6-213:13.

Mowery confirmed after reviewing Galle's timecards that "these activities were taking place on paid company time." See Tr. at 204:7-14. Mowery also noticed that the sites in question never appeared on the firewall log again after Galle was fired. See Tr. at 214:7-215:1.

Galle could have easily supported his assertion that he was only using his laptop to look up transmission parts on the morning of October 1, 2015 by providing his laptop or a copy of his browser history. Instead, Galle lied about his computer activities to both Rod Tschiggfrie, and Judge Locke while Galle was under oath. See Tr. at 141:11-14. Judge Locke recognized Galle's testimony about his computer activity was false, specifically finding that "where Galle's testimony conflicts with other evidence, I do not credit it. However, the case does not turn on the reliability of Galle's testimony." See Decision at pp. 8, 14.

ISSUE TO BE ARGUED

On remand, the only issue before the Board is whether, applying the Wright Line standard, Tschiggfrie violated sections 8(a)(1) and (3) when it terminated Galle.

ARGUMENT

I. APPLYING *WRIGHT LINE*, THERE IS INSUFFICIENT EVIDENCE OF A CAUSAL CONNECTION BETWEEN GALLE'S PROTECTED ACTIVITY AND HIS TERMINATION.

Sections 8(a)(1) and (3) of the Act prohibit an employer from terminating an employee for engaging in protected activities. See 29 U.S.C. § 158(a)(1), (3) (2015). However, an employer may terminate an employee for any other reason unrelated to the employee's protected activities. See Nichols Aluminum, LLC v. NLRB, 797 F.3d 548, 554 (8th Cir. 2015). To prove that an employee's discharge constitutes an unfair labor practice under the Act, the General Counsel must prove "that the employee's protected conduct was a substantial or motivating

factor in the adverse action.” Id. Motivation “is a question of fact that may be inferred from both direct and circumstantial evidence.” NLRB v. RELCO Locomotives, Inc., 734 F.3d 764, 780 (8th Cir. 2013). If an employer “articulates a facially legitimate reason for its termination decision, but that motive is disputed”, the Wright Line analysis is applied. Id.

Under the Wright Line analysis, the general counsel bears the initial burden of proving that the employee’s engagement in protected activity was a motivating factor in his termination. Id. If the general counsel meets its initial burden, the burden shifts to the employer, “which can exonerate itself by showing that it would have [made the decision] for a legitimate, nondiscriminatory reason regardless of the employee’s protected activity.” Carleton College v. NLRB, 230 F.3d 1075, 1078 (8th Cir. 2000). The Wright Line analysis is designed to “protect the rights of employees while preserving an employer’s right to discharge an employee for a valid cause.” Nichols Aluminum, 797 F.3d at 554.

To carry its initial Wright Line burden in this case, the general counsel must prove each of the following by a preponderance of the evidence: 1) Galle engaged in protected activity; 2) Tschiggfrie knew Galle had engaged in protected activity; and 3) Galle’s engagement in protected activity was a motivating factor in Tschiggfrie’s decision to terminate him. See RELCO Locomotives, 734 F.3d at 780. Proof of these elements requires more than just a showing of anti-union animus: “Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer’s motive was discriminatory, . . . general hostility toward the union does not itself supply the element of unlawful motive.” Nichols, 797 F.3d at 554-55. Instead, the general counsel “must establish that the employee was discharged for his union activities or membership—that **but for** his union activities or membership, he would not have been

discharged.” Id. (emphasis added); see also Carleton College, 230 F.3d at 1078 (stating that general counsel had to offer proof that employer **acted** on animus to meet burden under Wright Line).

In Galle’s case, there is insufficient evidence from which the Board could find a nexus between Galle’s protected activity and his termination. Evidence that may support the finding of a discriminatory motive includes: 1) implausible, false, or shifting reasons for a termination; 2) hostility toward the union; and 3) suspicious timing of discharge. See RELCO Locomotives, 734 F.3d at 782. In this case, there were no implausible, false, or shifting reasons for Galle’s termination. Rod Tschiggfrie terminated Galle for working on his home business during company time. See Tr. at 37:1-12.

The timing of Galle’s termination was not suspicious either. See Tr. at 44:9-46:3. Rod Tschiggfrie observed Galle’s personal laptop opened to a webpage unrelated to Tschiggfrie’s business. See Tr. at 81:18-21, 357:6-17. When Rod Tschiggfrie asked Galle about the webpage, Galle lied, telling Rod Tschiggfrie that he had been looking for information on a transmission. See Tr. at 44:9-46:3. Rod Tschiggfrie then told Galle he was terminated. See Tr. 44:9-46:3.

The only evidence that passes as evidence of hostility towards the Union is the August 17, 2015 letter to Galle warning him not to discuss Union matters at work. See General Counsel’s Exhibit 5. As discussed above, evidence of union hostility alone is not enough to prove discriminatory motive. See Nichols Aluminum, 797 F.3d at 554-55. Other than the August 17, 2015 letter, the record is devoid of any evidence that would support the finding of a nexus or causal connection between Galle’s protected activity and his termination.

Judge Locke commented in his decision that “[t]he circumstances surrounding the discharge suggest almost an impulsive, spur-of-the-moment decision, not a careful plot to

conceal discrimination behind a crafted pretext.” See Decision at p. 8. Impulsive, spur-of-the-moment employment decisions are not unlawful, so long as the reasons for the decision are unrelated to an employee’s protected activities. See Nichols Aluminum, 797 F.3d at 554. The record in this case is insufficient to establish a causal connection between Galle’s protected activity and his termination as required by Wright Line. Instead, the substantial weight of the evidence shows that Rod Tschiggfrie’s decision to terminate Galle was a lawful, albeit arguably impulsive, spur-of-the-moment decision based on his own observation of Galle’s misconduct. Without sufficient evidence of a nexus between Galle’s protected activity and his termination, the Board should find that Tschiggfrie’s termination of Galle did not violate the Act.

II. TSCHIGGFRIE WOULD HAVE DISCHARGED GALLE EVEN IN THE ABSENCE OF HIS PROTECTED ACTIVITY.

As discussed above, Tschiggfrie believes there is no evidence that its termination of Galle was motivated by Galle’s participation in protected activity. Assuming for the sake of argument that the general counsel did meet its burden under the Wright Line analysis, the burden shifts to Tschiggfrie to show that it would have terminated Galle even in the absence of his protected activity. See Nichols Aluminum, 797 F.3d at 554. The substantial weight of the record evidence shows Tschiggfrie would have terminated Galle even if he had not engaged in protected activity based on his use of company time to conduct his own business.

In the months leading up to October 1, 2015, Tschiggfrie had received complaints about Galle sleeping on the job and using company time to operate his own business. See Tr. at 60:15-61:7. Galle knew that he was not supposed to be working on his personal business during company time, and agreed that such conduct would intentionally disregard Tschiggfrie’s interests. See Tr. at 152:10-153:4. Kim Melancon, a now-retired Tschiggfrie employee, also

testified that he understood that working on private business during company time was not allowed at Tschiggfrie. See Tr. at 298:3-12.

When Rod Tschiggfrie observed Galle's laptop at his workstation opened to a webpage unrelated to Tschiggfrie's business on October 1, 2015 Rod Tschiggfrie knew Galle was using company time to work on his internet-based sales business. See Tr. at 357:6-17. Tschiggfrie does not tolerate the theft of company time. See Tr. at 357:6-17. Galle denied the allegation that he had been working on his home business when Rod Tschiggfrie questioned him about it. See Tr. at 44:9-46:3. Rod Tschiggfrie did not believe Galle and made the decision to terminate Galle based on his theft of company time. See Tr. at 35:20-37:23. Rod Tschiggfrie's decision to terminate Galle **was** made independent of Galle's union affiliation and was based on a legitimate and nondiscriminatory reason: Galle's use of company time to work on his personal business. See Tr. at 90:21-25; see also Sysco Food Services of Cleveland, Inc., 347 NLRB No. 98 (2006)(finding employer would have discharged employee even in absence of protected activity based on employee's theft of company time in violation of employer's rules). To the extent the Board finds that the general counsel carried its initial burden under Wright Line, it should further find that Tschiggfrie would have terminated Galle in the absence of his protected activity.

CONCLUSION

For the foregoing reasons, Tschiggfrie Properties, Ltd. respectfully requests that, on remand, the Board find that Tschiggfrie's termination of Galle did not violate the Act.

Respectfully submitted,

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Dated: January 7, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Tschiggfrie Properties, Ltd.'s Statement of Position in Case 25-CA-161304 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 7th day of January, 2019:

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